Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs

GEORGE E. JONES, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

vs

WILLIE A. GRAHAM AND DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR
Respondents.

BRIEF OF RESPONDENT WILLIE A. GRAHAM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the respondent, Willie A. Graham, was an "employee" within the meaning of the term in the Longshoremen's and Harbor Workers' Compensation Act when he sustained an injury when working as a "chipper" in a shop in the Petitioner's shipyard while he was working on a sonar shield to be installed on a submarine in a shipway approximately 1900 feet from the ship.

STATUTE INVOLVED

The relevant portion of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 3(a), 86 Stat. 1251, 1256, 33 U.S.C. §903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from the injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.) * * *

Section 2(3), 86 Stat. 1251, 33 U.S.C. §902(3):

> The term "employee" means only persons engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and a harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. §902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT OF THE CASE

The claimant, Willie A. Graham, an employee of Newport News Shipbuilding and Drydock Company, sustained a low back strain on April 3, 1975, while working as a "chipper" in a submarine shop located approximately 1200 feet from the navigable James River. The shop was one of numerous other shops and plants in this shipyard utilized by the employer for the construction and repair of seagoing vessels. The submarine shop was used primarily for the building of component ship parts from raw and fabricated materials. At the time of the injury, the claimant was working as a "chipper", removing a flat bar (an alignment piece) from a sonar shield so that it could be further prepared for installation on a submarine in a shipway approximately 1900 feet from the shop. The claimant, Willie A. Graham, testified that the activities conducted in the submarine shop involved the construction of parts that go into the building of a ship, and that at the time he sustained the injury complained of, was working on a sonar shield which would be delivered for installation in a ship. Numerous witnesses for the Petitioner testified that the activities of the claimant were "necessary" to the building or repairing of a ship, and that it was not necessary for a person to be working aboard a vessel in order that he be considered contributing to the building of that vessel.

THERE IS NO GOOD REASON TO GRANT REVIEW

Petitioner contends that review should be granted to the decision of the United States Court of Appeals for the Fourth Circuit because of what the Petitioner perceives as inconsistencies and conflicts surrounding the definition and application of "maritime employment." In fact, the case was correctly decided by the United States Court of Appeals for the Fourth Circuit in accord with the principles enuciated by this Court in Northwest Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977). A reading of the Caputo case clearly reveals that this Court, in addressing itself to the issue, discussed an overwhelming number of the cases cited by the Petitioner and found no conflict between the various Circuit Courts except for the Fourth Circuit, which has now adjusted its position in conformity with the Supreme Court decision in Caputo.

In response to the inequities brought by Nacirema Operating Company v. Johnson, 396 U.S. 212, (1969), Congress enacted amendments to the Longshoremen's and Harbor Workers' Compensation Act, which require a claimant to satisfy both the "status" and "situs" requirements in order to gain the benefits of the Act.

The Fourth Circuit is clearly in accord with all of the other circuits and the decision of this Court holding that the 1972 amendments of the Longshoremen's and Harbor Workers' Act enlarged the "situs" so as to provide compensation for injuries occurring at designated shoreside facilities as well as on shipboard.

The First Circuit, in Stockman v. John T. Clark & Sons of Boston, 539 F.2d 264, (1st. Cir. 1976), held that the "situs" is not to be limited only to "those areas directly adjoining the berth of a specific vessel" but included those locations which are "customarily used" in loading and unloading vessels. Only those areas of waterfront which only have some "incidental connection with navigable waters" were to be outside the situs test.

The Court placed great emphasis on rejecting labels and that it was "the nature of the work being performed" that was determinative and that where the activity was an integral step in the process of unloading a vessel, the Act was satisfied.

The Third Circuit, in Sea-Land Serv. v. Director, Office of Wkrs' Comp., etc., 540 F.2d 629 (3rd Cir. 1976), referring to the enumerations of the various areas set forth in the Act, held that these enumerated areas are not to be exclusive, but that as long as the "employment nexus" with maritime activity is maintained, the Longshoremen's and Harbor Workers' Act should be applicable.

In another decision of the Third Circuit, Dravo Corp. v. Maxin, 545 F.2d 374 (3rd Cir. 1976) Cert. denied, 97 S.Ct. 2973 (1977), the Court adopted language similar to that utilized by this Court in holding that the Act was applicable where the activities conducted were "an integral part" of the Dravo's shipbuilding operations.

Dravo Corp. v. Maxin, supra, is clearly distinguishable from and consistent with the decision of the Third Circuit in Dravo Corp. v. Banks, 567 F.2d 593 (3rd Cir. 1977), cited by the Petitioner where an employee was denied benefits, when he was injured performing ice remover operations as part of the plant maintenance. The activity was clearly not an "integral part" of the process of vessel construction but was an activity conducted by any business.

The Fifth Circuit addressed the issue in Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), in ruling that a claimant working in a fabrication shop about 300 feet from a ship in which the propeller on which he was working would be installed, was covered under the Act. The reasoning of the Court in awarding benefits to the worker handling maritime cargo on shore as well as a carpenter fabricating parts for a new ship, while denying coverage to an employee engaged in tearing down a shop in a disuse marine repair facility, is not only consistent with the standard promulgated by the Fifth Circuit, but is in accord with the other circuits which have faced the question.

In another Fifth Circuit decision, Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977) cert. denied 98 S.Ct. 508 (1977), the Court, consistent with its earlier decision and those of the other circuits, ruled that an employee was covered by the Act notwithstanding that at the time of the injury the claimant was engaged in cleaning rather than constructing, since cleaning was

"a necessary prerequisite" to the fabrication of the steel for use in shipbuilding.

The fact that the claimant never went aboard a vessel as pointed out by the Petitioner is not only of no importance, but is not a factor in determining whether his activity is a "necessary prerequisite" or an "integral part" of shipbuilding.

The Ninth Circuit, in Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1976) cert. denied 429 U.S. 868 (1976), the Court found that an employee, to be eligible, must have been doing work which had a "realistically significant relationship" to traditional maritime activity.

Each of the above Circuit Courts, including the Fourth Circuit, appear to be consistent with each other, adopting numerous tests to determine whether the employment is a maritime employment. Whether such language involves "an integral part", "directly involved" or a "necessary prerequisite", the essence of the determination is the same. A review of each of these decisions reveals that they are consistent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 20, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 1978, copies of the foregoing Brief in Opposition were mailed, postage pre-paid, to all counsel of record for the Petitioner. I further certify that all parties required to be served have been served.

STUART R. GORDON

Counsel for Respondent,
Willie A. Graham